Supreme Court, U. S.
FILED
JUL 26 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-142

LINDA J. BOTKIN, ET AL.,
Petitioners,

— versus —

DELTA AIR LINES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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July 21, 1978

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO.

LINDA J. BOTKIN, ET AL.,
Petitioners,

— versus —

DELTA AIR LINES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray for the issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit, entered on April 28, 1978, in the case styled *Sarah Henson James, et al.* [*Plaintiffs/Appellees*] *v. Delta Air Lines, Inc.* [*Defendant/Appellant*], No. 76-2581, on appeal from the United States District Court for the Northern District of Georgia, Atlanta Division, Civil Action File No. C74-1676A.[1]

[1] Ten (10) of the thirteen (13) Plaintiffs/Appellees in the Court below have joined in this petition. Plaintiffs/Appellees, Sarah Henson James, Beverly Rossi-Espagnet, and Patricia G. Winstead, declined to participate.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, dated April 28, 1978, is reported at 571 F.2d 1376, and is reproduced in Appendix "B" at page B-1. The opinion and order of the United States District Court for the Northern District of Georgia Atlanta Division, dated March 10, 1976, is unreported and is reproduced in Appendix "E" at page E-1. The judgment pursuant to said opinion and order is reproduced in Appendix "D" at page D-1.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition for certiorari is presented within ninety (90) days of the date of the judgment of the United States Court of Appeals for the Fifth Circuit.

QUESTION PRESENTED

Whether a suit alleging that an employer's policy of refusing to accrue full seniority to employees during mandatory maternity leaves of absence, while permitting full seniority to accrue during sick and disability leaves of absence, fails to state a cause of action under Title VII of the Civil Rights Act of 1964, solely on the basis that no males were employed in Petitioners' employment classification when the maternity leaves at issue were taken.

STATUTORY PROVISION INVOLVED

This case involves the construction of § 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a), which provides that:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

The ten (10) Petitioners in this case, all female flight attendants currently employed by Respondent, DELTA AIR LINES, INC. [hereinafter referred to as "DELTA"], challenge DELTA's former policy of nonaccrual of full seniority during mandatory maternity leave as discrimination on the basis of sex. At some point during each Petitioner's employment with DELTA, prior to November, 1972, she became pregnant and pursuant to DELTA's maternity leave policy, was mandatorily relieved from her position as a flight at-

tendant as soon as she reported the fact of her pregnancy.

DELTA's maternity leave of absence policy required that the leave be taken without pay and, more importantly in career terms, with no accrual of seniority for pay and bidding purposes except for the first three (3) months of the maternity leave. In contrast, DELTA accrued full seniority during the corresponding time period for *all* company employees who were absent from work due to non-work related disabilities and sickness. Moreover, in all other non-work related leave policies of DELTA, at the time relevant herein, the decision as to whether or not to take the leave was basically a voluntary matter with each employee.

Each Petitioner complied with DELTA's requirements as to leave and return, pursuant to the maternity leave policy at issue. DELTA's maternity leave policy was changed on November 29, 1972, to allow full accrual of seniority during the mandatory leave. Petitioners' lost seniority has never been reinstated, and each Petitioner continues to receive lower pay and to be outbid by other flight attendants over whom Petitioners would have greater seniority, but for the employment policies at issue here.

Petitioners contend that DELTA's maternity leave of absence policy penalizes them for being women and suffering disabilities to which they alone are inherently susceptible, and that such loss of seniority due to maternity leave constitutes unlawful sex discrimination pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.* Each Petitioner filed a charge of sex discrimination with the

Equal Employment Opportunity Commission [hereinafter referred to as the "EEOC"], and after the receipt of "right to sue" letters from the EEOC, the present lawsuit was filed on August 22, 1974. Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1343.

DELTA filed a motion for partial summary judgment in the District Court on the grounds of untimely filing of charges with the EEOC by a majority of the Petitioners. The District Court denied this motion on April 1, 1975. The case was tried without a jury on December 1st, 2nd and 3rd, 1975. By its opinion and order dated March 10, 1976, the District Court found the nonaccrual of seniority under DELTA's maternity leave policy to be discriminatory and ordered reinstatement of full seniority to Petitioners and back pay based on the added seniority from December 1, 1972 (Appendix "E", page E-1). DELTA filed a motion for reconsideration, which the Court denied on April 12, 1976. Judgment was subsequently entered for Petitioners on April 22, 1976 (Appendix "D", page D-1).

DELTA appealed the decision of the District Court to the Court of Appeals for the Fifth Circuit. In a per curiam opinion issued April 28, 1978, the Court of Appeals reversed the District Court, holding that Petitioners' complaint failed to state a cause of action under Title VII solely on the basis that DELTA employed no male flight attendants when the maternity leaves at issue were taken (Appendix "B", page B-1). Accordingly, the District Court, on remand, ordered the case dismissed on May 31, 1978 (Appendix "A", page A-1).

REASONS FOR GRANTING THE WRIT

This case presents a fundamental question concerning the scope of the prohibition against sex discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, in the specific context of an employer's seniority policy for female employees taking maternity leave. In holding that Petitioners' complaint failed to state a cause of action under § 703(a)(2) of Title VII, 42 U.S.C. § 2000e-2 (a)(2), the Fifth Circuit has apparently adopted a blanket rule denying relief under the Act in *any* situation where, because of a female employee's job classification, discrimination *vis a vis* men cannot be specifically demonstrated in that classification. *See also, Stroud v. Delta Air Lines, Inc.*, 544 F.2d 892, *rehearing denied*, 548 F.2d 356, *cert. denied*, 434 U.S. 844 (1977). In petitioners' view, such an interpretation of Title VII, when viewed in relation to applicable decisions of this Court, sweeps too broadly as applied to the employment policies involved in the instant case.

Petitioners have suffered a partial loss of seniority resulting from their employer's mandatory maternity leave policy, a loss not imposed by DELTA on employees taking sick and disability leaves of absence. In *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), this Court recently decided that an employer's policy of denying accumulated seniority to female employees returning from pregnancy leave, while permitting retained seniority following leaves for all other nonoccupational disabilities, violated § 703(a)(2). In Petitioners' view, the holding of the Court of Appeals in the instant case is clearly inconsistent with *Satty*, but for the fact that here no men were employed by

DELTA as flight attendants when the maternity leaves at issue were taken.

While this Court's opinion in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), held that a violation of § 703(a)(1) did not occur simply because an employer's disability benefits plan failed to extend benefits to pregnant employees, a violation of § 703(a)(2) was found to exist in *Satty*, based on the consideration that seniority rights directly affect an employee's employment status. In making this distinction, the Court stated that § 703(a)(2) does not "permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role." *Satty, supra*, at 142.

As this Court's opinion in *Griggs v. Duke Power Co.*, 401 U.S. 431 (1971), makes clear, it is not necessary to show that all members of a class are adversely affected in order to find a violation of § 703(a)(2), so long as the adverse impact is shown to fall disproportionately on that class. In *Griggs*, a disproportionate number of blacks failed to meet the requirements of the employment policies involved there. Here, women employees, even though not all women employees, were affected by DELTA's seniority policy as it relates to maternity leave. The fact that DELTA employed no male flight attendants when the maternity leaves at issue were taken does not abrogate the discriminatory effect that DELTA's leave policies had upon pregnant flight attendants relative to their status as employees, a discriminatory effect unjustified by business necessity.

Review of the decision of the Court of Appeals in this case is necessary to resolve several issues in the construction of Title VII raised by this decision:

(1)

This Court has stated that the objective of Congress in enacting Title VII was to "achieve equality of employment opportunities." *Griggs, supra,* at 429. In *Satty,* this Court found that an employer's policy of denying accumulated seniority to employees returning from maternity leave violated Title VII because it affected their "status" as employees. In the instant case, the decision of the Court of Appeals serves to uphold discrimination against pregnant employees regarding seniority rights simply on the basis that no men were similarly employed at the time. In Petitioners' view, their status as employees has been affected by a discriminatory practice in violation of Title VII, irrespective of the employment of male flight attendants, due to the unique status of pregnancy as a gender-based condition. Since only women have the capacity to bear children, only women may be adversely affected by the employment practices herein involved. The unequal treatment given pregnant flight attendants by DELTA will have a lasting effect throughout the terms of their employment. In the final analysis, it is up to this Court to determine whether or not discrimination based on pregnancy, which so vitally affects the employment status of each Petitioner, constitutes the kind of gender-based discrimination Congress intended to eliminate through Title VII.

(2)

The decision of the Court of Appeals is based solely on the fact that DELTA employed no male flight attendants at the time when the maternity leaves at issue

were taken. At that time, DELTA did, however, employ men in a variety of capacities in other areas of their corporate operation. It is significant to note that DELTA followed a uniform set of sick and disability leave policies applicable to all employees throughout the company which permitted full seniority to accrue during such leave. In effect, flight attendants required to take mandatory maternity leave were being discriminated against *vis a vis* men on a company-wide basis, if not perhaps within their own employment classification. While seniority for bidding purposes may sometimes have primary importance within a single job classification, seniority for pay purposes affects employees irrespective of their employment classification. The decision of the Court of Appeals should be reviewed by this Court to determine whether or not discriminatory practices prohibited by Title VII are to be judged exclusively within the aggrieved employees' job classification or on a broader basis, more in keeping with the actual effect such policies have upon the employees' employment status.

(3)

As noted in *Gilbert,* an otherwise valid distinction involving pregnancy will violate Title VII, where it can be demonstrated that such is a mere pretext "designated to effect an invidious discrimination against the members of one sex or the other." 429 U.S. at 135, quoting *Geduldig v. Aiello,* 417 U.S. 484, at 496-497, n. 20 (1974). DELTA has neither alleged, nor proved, that its differential treatment of maternity leave for flight attendants relative to accrued seniority was justified by business "necessity." *See, e.g., Dothard v.*

Rawlinson, 433 U.S. 321 (1977). In fact, no economic justification exists for treating maternity leave differently for purposes of seniority than for other types of leave. In Petitioners' view, such an arbitrary policy as applied to an employment classification composed wholly of women serves to "effect an invidious discrimination" against female employees based on stereotyped attitudes concerning the role of women in the labor force. The decision of the Court of Appeals would automatically preclude such an inquiry under Title VII merely on a showing that no males were similarly employed at the time of the alleged violations. Given the possible broad ramifications of such an interpretation of Title VII in other employment contexts, this Court should review this decision to determine whether or not Title VII claims of invidious discrimination are actionable under these factual circumstances.

(4)

Guidelines promulgated by the EEOC in 1972, specify that "written and unwritten employment policies and practices involving . . . the accrual of seniority . . . shall be applied to disability due to prgenancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." 29 CFR § 1604. 10(b) (Appendix "F", page F-1). After rejecting another portion of this same guideline in *Gilbert*, this Court in *Satty* cited with approval the portion quoted above. *Satty*, *supra*, 434 U.S. 136, 142-143, n. 4. The decision by the Court of Appeals in the instant case failed to give any consideration to the EEOC guideline even though plainly applicable to the issue upon which the case was decided. While this Court has never

viewed such promulgations as controlling upon judicial review, neither has it sanctioned their complete disregard in applicable circumstances. Rather, this Court has adopted an analytical approach for ascertaining the persuasiveness of individual guidelines. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *See also*, *Espinosa v. Farah Mfg. Co.*, 414 U.S. 86, 94 (1973); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 434 (1975). Having established that the relevant guideline here is entitled to consideration, this Court should review this case to determine the weight to be accorded this guideline under these factual circumstances.

CONCLUSION

As outlined above, this case presents a fundamental question concerning the scope of Title VII's prohibition against sex discrimination. Since the relationship between pregnancy and a woman's employment status is of national significance, the issues thus raised by the decision of the Court of Appeals should be settled by this Court.

PRAYER

Petitioners pray that a "Writ of Certiorari" be granted to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

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July 21, 1978

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SARAH HENSON JAMES, et. al.	:	
v.	:	C74-1676A
DELTA AIR LINES, INC.	:	

ORDER

Pursuant to the Order of the Fifth Circuit Court of Appeals entered on April 28, 1978, the instant action is hereby DISMISSED for failure to state a cause of action under Title VII.

This 31st day of May, 1978.

/s/ CHARLES A. MOYE, JR.
United States District Judge

APPENDIX B

Sarah Henson JAMES et al.,
Plaintiffs-Appellees,

v.

DELTA AIR LINES, INC.,
Defendant-Appellant.

No. 76-2581.

United States Court of Appeals,
Fifth Circuit.

April 28, 1978.

Appeal from the United States District Court for the Northern District of Georgia.

Before GOLDBERG and SIMPSON, Circuit Judges, and FREEMAN, District Judge*

PER CURIAM:

Plaintiffs, thirteen female flight attendants, filed this suit pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, alleging that their employer, Delta Air Lines, discriminated against them on the basis of their sex. Each plaintiff had taken a mandatory maternity leave of absence and

*District Judge of the Northern District of Georgia, sitting by designation.

subsequently returned to work prior to November, 1972, during which time Delta allowed seniority for bidding and pay purposes to accrue only for the first three months of such leave. Since each leave was in excess of three months, each plaintiff has suffered a partial loss of seniority as a result of her maternity leave. At the time that each plaintiff took her maternity leave, Delta employed no male flight attendants. The district court held for the plaintiffs, finding Delta's pre-November, 1972, policy "unlawfully discriminatory".

Subsequent to the district court's decision in this case, we decided *Stroud v. Delta Air Lines, Inc.*, 544 F.2d 892 (5th Cir. 1977), cert. denied, 434 U.S. 844 (1977). In *Stroud*, a former Delta stewardess alleged that Delta's policy forbidding the employment of any married stewardess violated Title VII. We disagreed, noting that because Delta hired only women as flight attendants/stewardesses until December, 1972, plaintiff's discharge in 1971 did not constitute discrimination based on sex. We explained our holding as follows:

> Here, plaintiff is not a member of one of the relevant, identifiable classes which has been discountenanced in favor of another such class. Rather, certain women—stewardesses who are unmarried—are favored over certain other women—stewardesses who are married. As one of the all-female group of flight attendants employed by Delta, plaintiff suffered a discrimination, but it was based on marriage and not sex. Men were not favored over women; they simply were not involved in the functioning of the policy.

544 F.2d at 893. See also *McMonigle v. Delta Air Lines, Inc.*, 556 F.2d 1261 (5th Cir. 1977).[1]

We hold that *Stroud* controls the instant case and requires reversal of the district court. Although *Stroud* involved a policy affecting married persons and this case involves a policy affecting pregnant persons, the distinction is immaterial here. We recognize, of course, that both men and women may marry but that only women may become pregnant. However, under the specific facts of this case, the discrimination practiced by Delta prior to November, 1972, *could not* have affected women vis-a-vis men because Delta employed no male flight attendants during the period when the instant plaintiffs took their maternity leaves. To paraphrase *Stroud*, plaintiffs suffered a discrimination, but it was based on pregnancy and not sex.

Because *Stroud* is dispositive of the plaintiffs' claims in this case, we do not reach the question of whether plaintiffs' charges of discrimination were timely filed with the EEOC, as required by *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977). Also, because Delta employed no male flight attendants when the maternity leaves at issue were taken, we are foreclosed from consideration of whether Delta's policy would have constituted sex discrimination in violation of Title VII had both males and females been employed as flight attendants at that time. *Compare General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), *with Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977).

[1] Although it involved a charge of discrimination based on national origin rather than sex, our recent decision in *DeVolld v. Bailar*, 568 F.2d 1162 (5th Cir. 1978) [1978], supports the rationale of *Stroud*. In *DeVolld*, two Mexican-Americans applied for a single position. The one not hired alleged a violation of Title VII. We held that "whatever motives the Commission may have had in choosing between two people of the same ethnic origin, discrimination cannot have been among them. . . . (T)his being so, there is no Title VII action".

Accordingly, we reverse the judgment of the district court and remand with instructions to dismiss the plaintiffs' complaint as failing to state a cause of action under Title VII.

REVERSED and REMANDED, with directions.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-2581

D. C. Docket No. C74-1676A

SARAH HENSON JAMES, ET AL.,
Plaintiffs-Appellees,

versus

DELTA AIR LINES, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

Before GOLDBERG and SIMPSON, Circuit Judges, and FREEMAN, District Judge.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

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*District Judge of the Northern District of Georgia, sitting by designation.

of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions in accordance with the opinion of this Court;

It is further ordered that plaintiffs-appellees pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

April 28, 1978

Issued as Mandate: May 22, 1978

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SARAH HENSON JAMES, et al., Plaintiffs,	)	CIVIL ACTION FILE NO. C74-1676A
v.	)	
DELTA AIR LINES, INC., Defendant.	)	

JUDGMENT

This action came on for trial on December 1, 2, and 3, 1975 before the Court, Honorable Charles A. Moye, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered by Opinion and Order of the Court dated March 10, 1976,

IT IS HEREBY ORDERED AND ADJUDGED that Defendant, DELTA AIR LINES, INC., adjust Plaintiffs' seniority for bidding and pay purposes and all other benefits governed by seniority in accordance with the following list and that Defendant use such adjusted figures for the routine accrual of seniority through the date of entry of this Judgment and thereafter:

Adjusted Seniority on April 1, 1976:

Connie B. Toomey	10 Yrs., 4 Mos., 7 Da.
Penelope G. Redwine	12 Yrs., 4 Mos., 17 Da.
Sarah Henson James	10 Yrs., 2 Mos.
Beverly H. Rossi-Espagnet	9 Yrs., 10 Mos.

Patricia G. Winstead	10 Yrs., 3 Mos.
Peggy McMillian	10 Yrs., 11 Mos.
Patricia S. Barton	10 Yrs., 4 Mos., 24 Da.
Iris M. Laster	13 Yrs., 8 Mos., 18 Da.
Janice Yorker	17 Yrs., 2 Mos.
Jane Earle Kimball	12 Yrs., 3 Mos.
Linda Marshall	10 Yrs., 2 Mos., 8 Da.
Elizabeth S. Wansley	14 Yrs., 5 Mos.
Linda Botkin	7 Yrs., 9 Mos., 1 Da.

IT IS FURTHER ORDERED, that, the Plaintiffs recover of the Defendant, DELTA AIR LINES, INC., the following sums of money as back pay from December 1, 1972 through April 31, 1976:

Connie B. Toomey	$ 362.00
Penelope G. Redwine	$ 156.00
Sarah Henson James	$ 357.00
Beverly H. Rossi-Espagnet	$ 140.00
Patricia G. Winstead	$ 288.00
Peggy McMillian	$ 324.00
Patricia S. Barton	$ 288.00
Iris M. Laster	$ 45.00
Janice Yorker	No Back Pay Lost
Jane Earle Kimball	$ 155.00
Linda Marshall	$ 275.00
Elizabeth S. Wansley	No Back Pay Lost After 12-1-72
Linda Botkin	$ 185.00

IT IS ALSO ORDERED AND ADJUDGED that

Plaintiffs are awarded attorneys' fees in the amount of $15,630.00 and costs of this action.

This Judgment shall take effect fourteen (14) days after entry upon the records of the Court.

Dated at Atlanta, Georgia, this 22nd day of April, 1976.

CHARLES A. MOYE,
Judge, District Court,
Northern District of Georgia

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SARAH HENSON JAMES, et al., Plaintiffs	:	
v.	:	C74-1676A
DELTA AIR LINES, INC., Defendant	:	

OPINION AND ORDER

This action is an employment discrimination suit brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), *et seq.* Plaintiffs are thirteen female flight attendants, all currently employed by defendant.

Each plaintiff has at one point in her employment taken a mandatory maternity leave of absence from employment, and thereafter returned to work with defendant. Since each such leave commenced prior to November, 1972, it was under defendant's former policy of allowing seniority for bidding and pay purposes to accrue only for the first three months of such leave. Since each leave was in excess of three months, plaintiffs' loss of seniority for both bidding and pay purposes was as follows:

	Plaintiff	Seniority-Lost
(1)	Connie B. Toomey	six months and seven days
(2)	Penelope G. Redwine	five months and fourteen days

(3)	Sarah Henson James	six months
(4)	Beverly Rossi-Espagnet	three months
(5)	Patricia G. Winstead	four months
(6)	Peggy McMillian	six months
(7)	Patricia S. Barton	three months and twenty-four days
(8)	Iris M. Laster	seven months and eighteen days
(9)	Janice Yorker	six months
(10)	Jane Earle Kimball	five months
(11)	Linda Marshall	five months and eight days
(12)	Elizabeth S. Wansley	three months
(13)	Linda Botkin	three months and nineteen days

Defendant's seniority accrual policy for flight attendants on maternity leave was changed in November of 1972 to allow seniority to continue to accrue during the entire maternity leave.

The issue in this case is whether defendant's former policy of accruing seniority for only part of a maternity leave constitutes discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, and, if so, what are the consequences under the Act.

Defendant argues that its pregnancy leave policy is not *sex* discriminatory, citing, principally, *Geduldig v. Aiello*, 417 U.S. 484 (1974); plaintiffs point out that case involves constitutional questions, not statutory Title VII questions, relating to a California employee-supported disability insurance program for non-work-related disabilities. The Supreme Court, in *Geduldig*, held that:

> "While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . ." (Geduldig, fn. 20).

Obviously, in an insurance context such as the Supreme Court had before it, such a classification realistically could have been, and probably was, a cost-based classification, as everyone who has paid for private disability insurance will recognize — those policies at least frequently containing strict limitations as to disability benefits attributable to pregnancy, if covered at all. This Court feels that the Supreme Court was merely holding that the California legislature could, in an employee funded scheme, legitimately base its classification on the cost involved, even though it affected persons of one sex only. Here there is no legislative classification involved; the inequal effect which constitutes discrimination is present, and there is no business necessity pleaded or proved. The Court finds the prior policy unlawfully discriminatory.

However, Delta has shown that its policy under attack was in conformity and reliance upon written opinions or interpretations of the Commission (1966 Opinion letters of EEOC General Counsel Charles Duncan) and it is therefore entitled to the protection of Title VII, § 2000(e) Regulations—

> "In any action or proceeding based on any alleged unlawful employment practices, no person shall

be subject to any liability for, or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the Act or omission complained of was in good faith, in conformity with and reliance on any written interpretation or opinion of the commission . . ."

The Court finds that defendant's earlier policy was in such good faith conformity; however, that defense, of course, disappears as to matters after November, 1972, when defendant's adoption of the new full-leave policy, clearly indicated the abandonment of reliance upon the earlier General Counsel letters and submission to the EEOC's new guidelines, published April 5, 1972, even though, as defendant contends, such guidelines were published without conformity to required procedures and constitutes an agency volte-face.

Reinstatement of plaintiffs' full seniority will not punish defendant, or create any liability on its part, and, therefore, is not precluded by the EEOC regulations quoted above. It is hereby ORDERED:

Much evidence was adduced to attempt to prove that plaintiffs were displaced from so-called A-lines, seniority positions carrying premium pay. However, this Court finds that such evidence is too speculative and conjectural to form the basis of an award of back pay.

However, the Court does hereby ORDER back normal pay based upon the added seniority to December 1, 1972, for each plaintiff.

Attorneys Fees

Plaintiffs seek attorneys fees in the amount of

$22,603.20 based on 332.4 hours with a breakdown of $75.00 per hour per partner, and $65.00 per hour for associates. Defendant concedes that such time may have been spent, but objects that some was inapplicable to this case, and some redundant, or unnecessary.

First, defendant objects, without rebuttal, that 38.7 hours were before the EEOC.

Second, defendant objects that plaintiff made unnecessary motions, and used excess trial personnel.

Third, defendant contends the rate as applied to partner time is excessive.

The figures submitted by plaintiffs are inadequate completely to reconcile these differences, but the Court believes a reasonable fee for plaintiffs can be construed as follows:

	332.4	hours claimed
less	38.7	hours—attributable to EEOC proceedings
	293.7	
less	10.0	hours—unnecessary motion work
	283.7	
less	23.2	hours—one excess trial personnel
	260.5	
times	$60.00	per hour—$75 per hour for partner and $50 (a reasonable rate for an associate) per hour for associates in roughly same mix as set forth in plaintiffs' affidavit.

Thus, the Court awards plaintiffs a fee of $15,630.

Let the attorneys for the parties meet within 10 days and jointly submit a judgment effectuating the above orders and rulings.

SO ORDERED, this 10th day of March, 1976.

/s/ CHARLES A. MOYE, JR.
United States District Judge

APPENDIX F

CODE OF FEDERAL REGULATIONS, TITLE 29 § 1604.10(b)

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

Supreme Court, U. S.
FILED
AUG 25 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 78-142

LINDA J. BOTKIN, ET AL.,
Petitioners,

versus

DELTA AIR LINES, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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DELTA AIR LINES, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, DELTA AIR LINES, INC., (hereinafter referred to as "Delta"), opposes the Petition for a Writ of Certiorari to the Fifth Circuit Court of Appeals on the grounds set forth herein.

OPINIONS BELOW

Delta acknowledges that the Petitioners have appended the pertinent portions of the opinions by the lower courts to their petition. All cites in this brief to matters contained in lower court opinions will be to the Petitioners' Appendix.

JURISDICTION

Delta agrees with Petitioners' statement with regard to the jurisdiction of this Court.

QUESTION PRESENTED FOR REVIEW

Delta respectfully disagrees with the Petitioners' statement of the questions presented for review. Delta respectfully submits that the only question properly submitted by the petition is:

Whether Petitioners may challenge, as violative of Section 703(a)(1) or 703(a)(2) of the Civil Rights Act of 1964, Delta's pre-1972 policy for flight attendants of limiting seniority accrual to the first ninety (90) days of maternity leaves of absence when, during that period, there were no similarly situated males who could have received favored treatment.

STATUTORY PROVISIONS INVOLVED

In addition to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, cited by Petitioners, the following provision of that Act is also relevant:

Section 713(b), 42 U.S.C. §2000e-12(b) provides in pertinent part:

> ". . . (b) in any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment on account of (1) the commission

> by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on *any* written interpretation or opinion of the commission . . . ." (Emphasis added).

STATEMENT OF THE CASE

Delta feels that the posture of this case has not been clearly or adequately presented by Petitioners and therefore respectfully offers the following counter statement of the case.

This is an employment discrimination suit brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq*. The Petitioners are ten (10) female flight attendants currently employed by Delta, each of whom has, at one point in her employment with Delta, taken a maternity leave of absence and subsequently returned to work. These maternity leaves ranged from less than six (6) months to more than ten (10) months duration.

There are three types of seniority at Delta which are relevant to the flight attendant position. Company or employment seniority governs benefits accrual such as retirement, sick leave and vacation eligibility. Pay seniority governs base salary levels within the particular job classification which are geared to length of service. Bid seniority for flight attendants[1] deter-

---

1 Bid seniority exists at Delta only within the flight attendant and pilot job classifications. Bid seniority for flight attendants has no relevance to pilots. Likewise, bid seniority for pilots has no relevance to flight attendants.

mines which flight attendants are assigned to which "trips" or group of flights at a particular flight attendant base. Under Delta's pre-1972 policy, the Petitioners continued to accrue employment seniority during the entirety of their maternity leaves but accrued pay and bid seniority for the first ninety (90) days only. Petitioners retained all seniority accrued prior to their leaves. Petitioners maintain that Delta's refusal to grant them pay and bid seniority for the entire length of their maternity leaves constituted unlawful discrimination on the basis of sex within the meaning of Title VII.

During the relevant time period when Petitioners took their maternity leaves, Delta's flight attendants consisted of an *entirely female* staff. There were no males involved in the functioning of the policy. No male flight attendant at Delta has ever been higher on the pay or bidding seniority lists than any of Petitioners.

In November of 1972, after the time that all of the Petitioners took their maternity leaves, Delta changed its policy so as to grant accrual of pay and bid seniority to flight attendants during the entirety of maternity leaves.

While Petitioners attempt to make much of other aspects of Delta's maternity leave policy for flight attendants, the seniority issue was the only aspect of that policy litigated in this case. The commencement and return dates of maternity leaves and the nonpayment of sick leave and disability benefits for absences associated with pregnancy were not challenged in the courts below.

After a full trial on the merits the District Court ruled that, even though Delta had pleaded and proved that its prior policy had been maintained in conformity with prior written interpretations or opinions of the EEOC, Plaintiffs were entitled to back seniority, back pay and attorneys fees. Petition for Writ, Appendix E. On appeal, the Fifth Circuit Court of Appeals reversed, reaffirming its holding in *Stroud v. Delta Air Lines, Inc.*, 544 F.2d 892, *rehearing denied*, 548 F.2d 356, *cert. denied*, 434 U.S. 884 (1977), that there must be a showing of some dissimilarity of treatment between males and females in order to prove a *prima facie* violation of Title VII. Petition for Writ, Appendix B.

REASONS FOR DECLINING TO ISSUE THE WRIT

I. The Legal Issues Surrounding The Pre-1972 Nonaccrual Policy Are Based On Peculiar Facts Not Likely To Recur

It is undisputed that Delta's pre-1972 policy of nonaccrual of seniority for pay and bidding purposes for certain extended periods of flight attendant maternity leaves has long since been changed. In the days when this rule was in effect at Delta, virtually all flight attendant jobs throughout the airline industry were held by females. That is simply no longer the case at Delta or in the industry generally, and there is no indication that that situation will recur or that Delta contemplates a return to its prior policies. Any controversy arising out of policies in existence at a time when women held all of the flight attendant jobs is of such minor current importance in the overall structure of Title VII law that its resolution by this Court is unnecessary.

II. Petitioners Suffered No Loss Of Seniority

In an effort to demonstrate some conflict between the ruling of the Fifth Circuit below and this Court's opinion in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), Petitioners claim to have suffered a loss of seniority as a result of the operation of the pre-1972 policy. Petition for Writ, p. 6. Petitioners' claim misconceives both the nature of seniority at Delta and this Court's holding in *Satty*.

In *Satty* female employees returning to work following maternity leave successfully maintained that their employer's policy of taking away job seniority which they had earned prior to the time their maternity leaves began constituted unlawful sex discrimination in violation of Title VII. 434 U.S. 136. Here, on the other hand, no previously earned seniority was taken away. Petitioners suffered no loss, or burden, because of being on leave of absence. Delta simply declined to grant them seniority for more than a portion of an extended period of time during which they did not work. Nothing in *Satty* indicates that it is sex discriminatory to allow some women who are actually performing job duties to accrue pay and bid seniority during a time when other women, who are not working, do not accrue it.[2] As the court said in *Harriss v. Pan American World Airways, Inc.*, 441 F. Supp. 881, 883 (N.D. Cal. 1977), in response to similar arguments regarding the effect of *Satty* on nonaccrual of seniority during maternity leave:

2 *Satty* did not involve the issue of nonaccrual of seniority during maternity leave. *See Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977).

> In the common understanding of the industrial world, seniority is earned for work done. Denying seniority for time during which an employee is not working cannot be regarded as the imposition of a burden. It is more akin to the denial of a benefit which, under the *Gilbert* [*General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)] analysis as applied to the facts of this case, does not run afoul of Title VII. *Gilbert* "did not require that greater economic benefits be paid to one sex or the other 'because of their different roles in the scheme of existence' " ___ U.S. ___, 98 S.Ct. 351, 54 L.Ed.2d 356.

Petitioners have suffered no *burden* at all. Their complaint with the pre-1972 policy flows from the fact that only a limited seniority *benefit* was granted to them during their maternity leaves.

III. Petitioners' "Disparate Impact" Argument Based On Section 703(a)(2) Is Misplaced

Petitioners' attempt to place reliance on disparate impact analysis (Petition for Writ, p. 7) shows a fundamental misconception of the principles set forth in this Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *Griggs* involved the use of standardized intelligence tests which operated to exclude black job applicants from employment opportunities at substantially higher rates than white job applicants. 401 U.S. at 426. The essential cornerstone in the application in *Griggs* of "disparate impact"

analysis was the clear disparity in the relative pass rates between black job applicants and white job applicants. The fact that blacks failed the tests at the rate of 94% would have been meaningless unless the white failure rate of 42% was there for comparison. 401 U.S. at 430, n.6. Here there are simply no males to compare and Petitioners' argument of "disparate" impact amounts to a non sequitur. The pay and bid seniority of flight attendants is simply irrelevant to any Delta employees but flight attendants. No male was ever elevated over any of Petitioners in either type of seniority because of the policy at issue in this case.

IV. The *Stroud* Principle Upon Which The Court Of Appeals Relied Is Consonant With Prior Opinions Of This Court

The rule of *Stroud v. Delta Air Lines, Inc.*, 544 F.2d 892 (5th Cir. 1977), *rehearing denied*, 548 F.2d 356, *cert. denied*, 434 U.S. 884 (1977), upon which the Court of Appeals relied, stands for the proposition that unlawful discrimination under Title VII cannot exist in the abstract. In order to prevail in a sex discrimination case such as this one, a plaintiff must show that she has been treated in a disparate way vis-a-vis similarly situated males. This was the essence of this Court's opinion in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). Unlawful discrimination can only be found where there is something to compare. *Cf. McDonnel Douglas Corp. v. Green*, 411 U.S. 792 (1973). Any other rule would require the federal courts to engage in speculation and the imposition of a court's business judgment for that of the employer. Congress intended no such interference with the business judgment of

employers when it enacted Title VII. *Furnco Construction Co. v. Waters*, ___ U.S. ___, 46 U.S.L.W. 4966 (June 29, 1978).

V. Petitioners' Arguments Concerning "Pretext" Are Belatedly Raised And Are Devoid Of Factual Support

Petitioners next argue that the Court of Appeals holding in this case would preclude proof of pretextual motivation underlying employment policies such as the pre-1972 seniority policy at issue here. Petition for Writ, p. 9. This argument, however, was not before the Court of Appeals because Petitioners had never raised it. At no time in the trial court did Petitioners argue that Delta's prior policy was a pretext for sex discrimination and no evidence was presented which could justify such a finding. It is entirely too late for Petitioners to argue pretext at this stage of the litigation.

CONCLUSION

For all of the above reasons, it is respectfully submitted that the Petition for a Writ of Certiorari to review the judgment and opinion of the Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three true and correct copies of the above and foregoing have been served on Petitioners by depositing the same in the United States Mail, postage prepaid, and properly addressed to John Walton Henderson, Jr., 1916 Piedmont Road, N.E., Atlanta, Georgia 30324, this the ____ day of August, 1978.

_____

Gordon Dean Booth, Jr.
Attorney for Respondent